



## OFFICE OF SCIENCE AND TECHNOLOGY POLICY

### 32 CFR Part 2403

#### Implementing the Freedom of Information Act

AGENCY: Office of Science and Technology Policy.

ACTION: Notice of proposed rulemaking and request for public comment.

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SUMMARY: With this document, the White House Office of Science and Technology Policy (OSTP) is proposing to issue regulations implementing the Freedom of Information Act (FOIA). The proposed regulations contain provisions to comply with the President's January 21, 2009, Executive Memoranda on "The Freedom of Information Act" and "Transparency and Open Government," as well as Attorney General Holder's March 19, 2009, Memorandum on "The Freedom of Information Act (FOIA)." In addition, the regulations reflect OSTP's policy and practices and reaffirm its commitment to provide the fullest possible disclosure of records to the public.

DATES: Comments will be received through June 11, 2012, 11:59 EST.

ADDRESSES: Comments of approximately one page or less in length (4000 characters) are requested and may be submitted by any of the following methods:

- E-mail: [ostpfoia@ostp.eop.gov](mailto:ostpfoia@ostp.eop.gov). Include "FOIA PROPOSED RULEMAKING" in the subject line of the message.
- Mail: Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave, NW, Washington, DC 20504. Attention: "FOIA PROPOSED

RULEMAKING.”

- FAX: 202-395-1224

All submissions must be in English and must include your name, return address and e-mail address, if applicable. Please clearly label submissions as “FOIA PROPOSED RULEMAKING.”

FOR FURTHER INFORMATION CONTACT: Jennifer Lee or Rachel Leonard, 202-456-4444. Questions about the content of this notice should be sent to [ostpfoia@ostp.eop.gov](mailto:ostpfoia@ostp.eop.gov). Include "FOIA PROPOSED RULEMAKING" in the subject line of the message. Questions may also be sent by mail (please allow additional time for processing) to: Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave, NW, Washington, DC 20504. Attention: “FOIA PROPOSED RULEMAKING.”

SUPPLEMENTARY INFORMATION: The Office of Science and Technology Policy (OSTP) is proposing regulations to govern its implementation of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. FOIA requires Federal agencies, as defined by the Act, to make official documents and other records available to the public upon request, unless the material requested falls under one of several statutorily prescribed exemptions. FOIA also requires agencies to publish rules stating the time, place, fees, and procedures to apply in making records available pursuant to a proper request. Further, Section 1803 of the Freedom of Information Reform Act of 1986 requires each agency to establish a system for recovering costs

associated with responding to requests for information under FOIA. The Office of Management and Budget (OMB) has issued guidelines that set standard government-wide definitions for assessing and collecting FOIA fees (OMB Fee Guidelines). These proposed rules describe the structure of OSTP's FOIA Requester Service Center, prescribe methods of requesting records, explain the manner in which OSTP responds to records requests, and describe policies governing applicable fees.

The proposed regulations also incorporate the policies expressed in President Obama's January 21, 2009, Executive Memorandum on the Freedom of Information Act, Attorney General Holder's March 19, 2009, Memorandum for Heads of Executive Departments and Agencies, and OSTP's FOIA Improvement Plan, issued in response to these directives. As required by the President's January 2009 Executive Memorandum, agencies, including those entities within the Executive Office of the President that are subject to FOIA, must adopt a presumption in favor of disclosure (except where disclosure creates a "foreseeable harm" as described in the Department of Justice, Office of Information Policy's April 17, 2009, Guidance) and ensure that their FOIA operations treat requesters courteously and appropriately. In addition, each agency is required to provide FOIA requesters and the public in general with "citizen-centered" ways to learn about both the agency's FOIA procedures and how to receive agency records that are publicly available.

By implementing the provisions of the January 21, 2009, Executive Memorandum and Attorney General Holder's March 19, 2009, Memorandum to the Heads of Executive Departments and Agencies, these regulations will improve FOIA-related service and performance, thereby

strengthening OSTP's compliance with FOIA. Accordingly, OSTP proposes these regulations implementing FOIA and submits them for public comment pursuant to 5 U.S.C. 552(a)(4)(A), (a)(6)(B)(iv), (a)(6)(D), (a)(6)(E), and 5 U.S.C. 553.

## Statutory and Executive Order Reviews

### Executive Order 12866

These regulations have been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, Section 1(b), Principles of Regulation. These regulations are not a significant regulatory action under Section 3(f) of Executive Order 12866.

### Paperwork Reduction Act

OSTP has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., does not apply because these regulations do not contain any information collection requirements subject to approval by OMB.

### Executive Order 12988

These regulations meet the applicable standards set forth in Executive Order 12988, Civil Justice Reform.

## Executive Order 13132

These regulations will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, OSTP has determined that these regulations do not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

## Regulatory Flexibility Act

OSTP, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed these proposed regulations and certifies that they will not have a significant economic impact on a substantial number of small entities because they pertain to administrative matters affecting the agency.

## Unfunded Mandates Reform Act of 1995

These regulations will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, et seq.

## Small Business Regulatory Enforcement Fairness Act of 1996

These regulations are not major regulations as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. They will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

National Environmental Policy Act of 1969

OSTP has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4347, and has determined that this action will not have a significant effect on the human environment.

List of Subjects for 32 CFR Part 2402 □□

Classified information□□

Therefore, according to reasons stated in the preamble, the Office of Science and Technology Policy proposes to add 32 CFR part 2402 to read as follows:

## **PART 2402—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT**

Sec.

- 2402.1 Purpose and scope.
- 2402.2 Delegation of authority and responsibilities.
- 2402.3 General policy and definitions.
- 2402.4 Procedure for requesting records.
- 2402.5 Responses to requests.
- 2402.6 Business information.
- 2402.7 Appeal of denials

2402.8 Fees.  
2402.9 Waiver of fees.  
2402.10 Maintenance of statistics.  
2402.11 Disclaimer.

Authority: 5 U.S.C. 552; E.O. 13392, 70 Fed. Reg. 75373 (Dec. 14, 2005).

### **§ 2402.1 Purpose and scope.**

These regulations prescribe procedures to obtain information and records from the Office of Science and Technology Policy (OSTP) under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The regulations apply only to records that are:

- (a) Either created or obtained by OSTP; and
- (b) Under OSTP control at the time of the FOIA request.

### **§ 2402.2 Delegation of authority and responsibilities.**

(a) The Director of the Office of Science and Technology Policy designates the OSTP General Counsel as the Chief FOIA Officer, and hereby delegates to the Chief FOIA Officer the authority to act upon all requests for agency records and to redelegate such authority at his or her discretion.

(b) The Chief FOIA Officer shall designate a FOIA Public Liaison, who shall serve as the supervisory official to whom a FOIA requester can raise concerns about the service the FOIA requester has received following an initial response. The FOIA Public Liaison will be listed on the OSTP website and may redelegate the FOIA Public Liaison's authority at his or her discretion.

(c) The Director establishes a FOIA Requester Service Center that shall be staffed by the Chief FOIA Officer and the FOIA Public Liaison. The contact information for the FOIA Requester

Service Center is Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave, NW, Washington, DC 20504; Telephone: (202) 456-6125  
Fax: (202) 456-6022; Email: [ostpfoia@ostp.eop.gov](mailto:ostpfoia@ostp.eop.gov).

### **§ 2402.3 General policy and definitions.**

(a) *Non-exempt records available to public.* Except for records exempt from disclosure by 5 U.S.C. 552(b) or published in the Federal Register under 5 U.S.C. 552(a)(1), agency records of OSTP subject to FOIA are available to any person who requests them in accordance with these regulations.

(b) *Record availability at the OSTP e-FOIA Reading Room.* OSTP shall make records available on its website in accordance with 5 U.S.C. 552(a)(2), as amended, and other documents that, because of the nature of their subject matter, are likely to be the subject of FOIA requests. To save both time and money, OSTP strongly urges requesters to review documents available at the OSTP e-FOIA Reading Room before submitting a request.

(c) *Definitions.* For purposes of this part, all of the terms defined in the Freedom of Information Act, and the definitions included in the "Uniform Freedom of Information Act Fee Schedule and Guidelines" issued by the Office of Management and Budget apply, unless otherwise defined in this subpart.

*Commercial use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. OSTP shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request

itself or because OSTP has reasonable cause to doubt a requester's stated use, OSTP shall provide the requester a reasonable opportunity to submit further clarification.

*Disclose or disclosure* refer to making records available, upon request, for examination and copying, or furnishing a copy of records.

*Duplication* means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others.

*Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

*Noncommercial scientific institution* means an institution that is not operated on a "commercial" basis, as that term is defined in these regulations, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

*Perfected request* means a FOIA request for records that adequately describes the records sought, that has been received by OSTP, and for which there is no remaining question about the payment of applicable fees.

*Representative of the news media* or *news media requester* mean any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. For purposes of this definition, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. For “freelance” journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but OSTP shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

*Search* refers to the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

*Working day* means a regular Federal working day. It does not include Saturdays, Sundays, or legal Federal holidays.

#### **§ 2402.4 Procedure for requesting records.**

(a) *Format of requests.* (1) *In general.* Requests for information must be made in writing and may be delivered by mail, fax, or electronic mail, as specified in § 2402.2(c). The words

"Freedom of Information Act Request" must be printed on the face of the request's envelope, cover sheet, or subject line, as appropriate, and must appear in the request itself. All requests must be made in English. Requests for information must specify the preferred form or format (including electronic formats) of the response. When requesters do not specify the preferred form or format of the response, OSTP shall produce printed copies of responsive records.

(2) *Electronic format records.* (i) OSTP shall provide the responsive record or records in the form or format requested if the record or records are readily reproducible by OSTP in that form or format. OSTP shall make reasonable efforts to maintain its records in forms or formats that are reproducible for the purpose of disclosure. For purposes of this paragraph, the term readily reproducible means, with respect to electronic format, a record or records that can be downloaded or transferred intact to a floppy disk, computer disk (CD), tape, or other electronic medium using equipment currently in use by the office or offices processing the request. Even though some records may initially be readily reproducible, the need to segregate exempt from nonexempt records may cause the releasable material to be not readily reproducible.

(ii) In responding to a request for records, OSTP shall make reasonable efforts to search for the records in electronic form or format, except where such efforts would significantly interfere with the operation of the agency's automated information system(s). For purposes of this paragraph, the term search means to locate, manually or by automated means, agency records for the purpose of identifying those records which are responsive to a request.

(iii) Searches for records maintained in electronic form or format may require the application of codes, queries, or other minor forms of programming to retrieve the requested records.

(b) *Contents.* A request must describe the records sought in sufficient detail to enable OSTP personnel to locate the records with a reasonable amount of effort. OSTP will regard a request

for a specific category of records as fulfilling the requirements of this paragraph if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive to OSTP operations. Whenever possible, a request should include specific information about each record sought, such as the date, number, title or name, author, recipient, and subject matter of the record. If OSTP determines that a request does not reasonably describe the records sought, it will either provide notice of any additional information needed or otherwise state why the request is insufficient. OSTP will offer a requester reasonable opportunity to reformulate the request so that it meets the requirements of this section.

(c) *Date of receipt.* A request that complies with paragraphs (a) and (b) of this section is deemed a perfected request. A perfected request is deemed received on the actual date it is received by OSTP. A request that does not comply with paragraphs (a) and (b) of this section is deemed received when sufficient information to perfect the request is actually received by OSTP. For requests that are expected to result in fees exceeding \$250, the request shall not be deemed to have been received until OSTP has received full payment or satisfactory assurance of full payment as provided under § 2402.7.

#### **§ 2402.5 Responses to requests.**

(a) *Responses within 20 working days.* OSTP will exercise all reasonable efforts to acknowledge, grant, partially grant, or deny a request for records within 20 working days after receiving a perfected request.

(b) *Extensions of response time in “unusual circumstances.”* In circumstances where a determination as provided in paragraph (a) of this section is not possible within 20 working days, OSTP may extend the time limit prescribed in paragraph (a) of this section as necessary to

adequately respond to a request. OSTP shall notify the requester of the extension, the reasons for the extension, and the date on which a determination is expected. In such instances, the requester will be provided an opportunity to limit the scope of the request so that it may be processed within the time limit, or to agree to a reasonable alternative time frame for processing. Circumstances justifying a time limit extension as provided in this subsection include, but are not limited to, requests that require OSTP to:

- (1) Search for and collect the requested records from off-site storage facilities;
- (2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request;
- (3) Consult, with all practicable speed, with another agency having a substantial interest in the determination of the request; or
- (4) Perform searches of records of former employees.

(c) *Two-track processing.* To ensure the most equitable treatment possible for all requesters, OSTP will process requests on a first-in, first-out basis, using a two-track processing system based upon the estimated time it will take to process the request.

(1) *Simple requests.* The first track is for requests of simple to moderate complexity that are expected to be completed within 20 working days. A requester whose request does not qualify as a simple request may be given an opportunity to limit the scope of his or her request in order to qualify for faster processing.

(2) *Complex requests.* The second track is for requests involving “unusual circumstances,” as described in paragraph (b) of this section, that are expected to take more than 20 working days to complete.

(d) *Expedited processing.* (1) *Expedited requests.* OSTP may take requests out of order and expedite the processing of a request upon receipt of a written statement that clearly demonstrates a compelling need for expedited processing. Requesters must provide detailed explanations to support their expedited requests. For purposes of determining expedited processing, the term compelling need means:

- (i) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of any individual; or
- (ii) That a request is made by a person primarily engaged in disseminating information, and the person establishes that there is an urgency to inform the public concerning actual or alleged Federal Government activity.

(2) *Certification.* A person requesting expedited processing must include a statement certifying that the compelling need provided is true to the best of the requester's knowledge and belief.

(3) *Expedited processing.* OSTP may grant or deny a request for expedited processing as a matter of agency discretion. A determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 working days after receipt of the perfected request.

(e) *Content of denial.* When OSTP denies a request for records, either in whole or in part, the written notice of the denial shall state the reason for denial, and cite the applicable statutory exemption(s), unless doing so would harm an interest protected by the exemption(s) under which the request was denied, and notify the requester of the right to appeal the determination as specified in § 2402.7. The requester's failure to make advance payment or to give a satisfactory assurance of full payment required under § 2402.8 may be treated as a denial of the request and appealed under § 2402.7.

(f) *Identifying responsive records.* In determining which records are responsive to a request, OSTP ordinarily will include only records in its possession as of the date the component begins its search for them.

(g) *Consultations and referrals.* When OSTP receives a request for a record in its possession, it shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. If the receiving component determines that it is best able to process the record in response to the request, then it shall do so. If the receiving component determines that it is not best able to process the record, then it shall either:

- (1) Respond to the request regarding that record, after consulting with the agency best able to determine whether to disclose it and with any other agency that has a substantial interest in it; or
- (2) Refer the responsibility for responding to the request regarding that record to the agency best able to determine whether to disclose it, or to another agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily, the agency that originated a record will be presumed to be best able to determine whether to disclose it.

(h) *Redactions.* OSTP shall provide to a requester a citation to the relevant statutory exemption(s) for redactions within disclosed records.

#### **§ 2402.6 Business information.**

(a) *In general.* Business information obtained by OSTP from a submitter will be disclosed under FOIA only under this section.

(b) *Definitions.* For purposes of this section:

- (1) Business information means commercial or financial information obtained by OSTP from a

submitter that may be protected from disclosure under Exemption 4 of FOIA.

(2) Submitter means any person or entity from whom OSTP obtains business information, directly or indirectly. The term includes corporations; state, local, and tribal governments; and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(d) *Notice to submitters.* A component shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) *Where notice is required.* Notice shall be given to a submitter wherever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) OSTP has reason to believe that the information may be protected from disclosure under Exemption 4.

(f) *Opportunity to object to disclosure.* OSTP will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period

within the notice. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to disclosure of the information.

Information provided by the submitter that is not received by OSTP until after its disclosure decision has been made shall not be considered by OSTP. Information provided by a submitter under this paragraph may itself be subject to disclosure under FOIA.

(g) *Notice of intent to disclose.* OSTP shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever OSTP decides to disclose business information over the objection of a submitter, OSTP shall give the submitter written notice, which shall include:

- (1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;
- (2) A description of the business information to be disclosed; and
- (3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

- (1) OSTP determines that the information should not be disclosed;
- (2) The information lawfully has been published or has been officially made available to the public;
- (3) Disclosure of the information is required by statute (other than FOIA) or by a regulation

issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous -- except that, in such a case, the component shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, OSTP shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever OSTP provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, OSTP shall also notify the requester(s). Whenever OSTP notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, OSTP shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, OSTP shall notify the requester(s).

#### **§ 2402.7 Appeal of denials.**

(a) A denial of a request for records, either in whole or in part, may be appealed in writing to the Chief FOIA Officer within 30 working days of the date of the letter denying an initial request.

(b) Appeals may be sent via email to [ostpfoia@ostp.eop.gov](mailto:ostpfoia@ostp.eop.gov) or by mail to: Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave, NW, Washington, DC 20504. The appeal letter should specify the internal control number assigned to the FOIA request by OSTP in its response, the records requested, and the basis for the appeal.

(c) The Chief FOIA Officer shall make a determination on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within 20 working days after the receipt of the appeal. If the denial is wholly or partially upheld, the Chief FOIA Officer shall notify the requester that judicial review is available pursuant to 5 U.S.C. 552(a)(4)(B)-(G).

#### **§ 2402.8 Fees.**

(a) *Fees generally required.* OSTP shall use the most efficient and least costly methods to comply with requests for documents made under FOIA. OSTP shall charge fees in accordance with paragraph (b) of this section unless fees are waived in accordance with § 2402.9.

(b) *Calculation of fees.* In general, fees for searching, reviewing, and duplication will be based on the direct costs of these services, including the average hourly salary (base plus locality payment plus 16 percent) for the employee(s) making the search.

(1) *Search fee.* Search fees may be charged even if responsive documents are not located or if they are located but withheld on the basis of an exemption. However, search fees shall be limited or not charged as follows:

(i) *Easily identifiable records.* Search fees shall not be charged for records that are identified by the requester by name and date.

(ii) *Educational, scientific or news media requests.* No search fee shall be charged if the request is not sought for a commercial use and is made by an educational or scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media.

(iii) *Other non-commercial requests.* No search fee shall be charged for the first two hours of searching if the request is not for a commercial use but is not by an educational or scientific institution, or a representative of the news media.

(iv) *Requests for records about self.* No search fee shall be charged to search for records performed under the terms of the Privacy Act, 5 U.S.C. 552a(f)(5).

(2) *Review fee.* A review fee shall be charged only for commercial requests. A review fee shall be charged for the initial examination of documents located in response to a request to determine the documents may be withheld from disclosure and for the redaction of document portions exempt from disclosure. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review are assessable.

(3) *Duplication fee.* Records will be photocopied at a rate of \$0.15 per page. For other methods of reproduction or duplication, OSTP will charge the actual direct costs of producing the document(s). Duplication fees shall not be charged for the first 100 pages of copies unless the copies are requested for a commercial use.

(c) *Aggregation of requests.* When OSTP determines that a requester, or a group of requesters acting in concert, is attempting to evade the assessment of fees by submitting multiple requests in the place of a single more complex request, OSTP may aggregate any such requests and charge accordingly.

(d) *Fees likely to exceed \$25.* If the total fee charges are likely to exceed \$25, OSTP shall notify the requester of the estimated amount of the charges. The notification shall offer the requester an opportunity to confer with the FOIA Public Liaison to reformulate the request to meet the requester's needs at a lower cost.

(e) *Advance payments.* Advance payment of fees will generally not be required. If, however, charges are likely to exceed \$250, OSTP shall notify the requester of the likely cost and:

- (1) Obtain satisfactory assurance of full payment; or
  - (2) if the requester has no history of payment or has failed to pay a fee within 30 days of the date of billing, OSTP may require the requester to pay the full amount of any fees owed and/or to make an advance payment of the full amount of the estimated charges before OSTP begins to process the new request or a pending request from that requester.
- (f) *Other charges.* OSTP will recover the full costs of providing services such as those enumerated below when it elects to provide them:
- (1) Certifying that records are true copies;
  - (2) Sending records by special methods such as express mail.
- (g) *Remittances.* Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave, NW, Washington, DC 20504.
- (h) *Receipts and refunds.* A receipt for fees paid will be given upon request. Refund of fees paid for services actually rendered will not be made.

#### **§ 2402.9 Waiver of fees.**

- (a) *In general.* OSTP shall waive part or all of the fees assessed under § 8 if the following conditions are satisfied:
- (1) Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and
  - (2) Disclosure is not primarily in the commercial interest of the requester.

(b) *Clarification.* Where OSTP has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, OSTP may seek clarification from the requester before assigning the request to a specific category for fee assessment purposes.

(c) *Partial waiver of fees.* If the two conditions stated in paragraph (a) of this section are met, OSTP will ordinarily waive all fees. In exceptional cases, however, a partial waiver may be granted if the request for records would impose an exceptional burden or require an exceptional expenditure of OSTP resources.

(d) *Failure to comply.* OSTP will not assess fees under § 2402.8 if the Agency fails to comply with any time limit and no exceptional circumstances apply to processing the request.

(e) *Waivers.* OSTP may waive fees in other circumstances solely at its discretion, consistent with 5 U.S.C. 552 and the Fee Waiver Policy Guidance issued by the Department of Justice.

#### **§ 2402.10 Maintenance of statistics.**

(a) OSTP shall maintain records that are sufficient to allow accurate reporting of FOIA processing statistics, as required under 5 U.S.C. 552 and all guidelines for the preparation of annual FOIA reports issued by the Department of Justice.

(b) OSTP shall annually, on or before February 1 of each year, prepare and submit to the Attorney General an annual report compiling the statistics maintained in accordance with paragraph (a) of this section for the previous fiscal year. A copy of the report will be available for public inspection at the OSTP website.

#### **§ 2402.11 Disclaimer.**

Nothing in this subpart shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under FOIA.

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Ted Wackler, Deputy Chief of Staff and Assistant Director

OSTP Billing Code – 3710-W12

[FR Doc. 2012-10868 Filed 05/08/2012 at 8:45 am; Publication Date: 05/09/2012]